

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

STEPHEN WOHL,
Plaintiff,

v.

MICHAEL ASTRUE, Commissioner
of Social Security
Defendant.

No. CV-0800278 CBM

ORDER:

- (1) GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT; AND
(2) DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT

The matters before the Court are Plaintiff Steven C. Wohl's and Defendant Commissioner of Social Security Michael Astrue's Cross-Motions for Summary Judgment.¹ The Court concludes that the Administrative Law Judge's finding that Plaintiff is not entitled to Social Security Disability and Social Security Disability Insurance Benefits is supported by substantial evidence and free from material legal error. Therefore, for the reasons set forth below, the Court **GRANTS**

¹ This case was transferred from the United States District Court of the Eastern District of Washington to the Honorable Consuelo B. Marshall, Senior District Court Judge for the Central District of California, by designation of the United States Court of Appeals for the Ninth Circuit.

1 Defendant's Motion for Summary Judgment, **DENIES** Plaintiff's Motion for
 2 Summary Judgment and **ENTERS JUDGMENT** in favor of Defendant.

3 **SUMMARY OF PROCEEDINGS**

4 This case arises out of the denial of Plaintiff Stephen C. Wohl's
 5 (hereinafter, "Plaintiff") Application for Social Security Disability and Disability
 6 Benefits. On September 10, 2008, Plaintiff filed a complaint seeking judicial
 7 review of the denial of benefits by the Commissioner of Social Security pursuant
 8 to the Social Security Act. This case was reassigned to this Court for all purposes
 9 on November 20, 2008. [Docket No. 9.] On February 10, 2009, Plaintiff filed a
 10 Motion for Summary Judgment. [Docket No. 13.] Defendant responded to
 11 Plaintiff's arguments and separately moved for Summary Judgment on March 20,
 12 2009. [Docket No. 15.]

13 **SUMMARY OF ADMINISTRATIVE RECORD**

14 **I. Summary Of The Proceedings**

15 Plaintiff alleges disability and applied for Social Security Disability and
 16 Disability Insurance Benefits on July 28, 2006. (Record at pp. 49-51.)

17 Plaintiff's Application was denied on October 10, 2006, and his request for
 18 reconsideration of his Application was denied on November 29, 2006. (*Id.* at pp.
 19 56-60.) An administrative hearing was held on July 31, 2007, before the
 20 Honorable Richard A. Say, Administrative Law Judge (hereinafter, the "ALJ").

21 In an Order dated October 9, 2007, the ALJ found that Plaintiff was not
 22 disabled pursuant to Sections 216(i) and 223(d) of the Social Security Act² and
 23 denied Plaintiff's Application. (*Id.* at p. 17.) The Appeals Council declined
 24 review and Plaintiff sought judicial review in this Court. (*Id.* at p. 18.)

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 26
 27 ² Both Sections 216(i) and 223(d) of the Social Security Act, codified at 42 U.S.C. § 416(i) and 42 U.S.C. § 423(d)
 28 provide in relevant part: "the term "disability" means (A) inability to engage in any substantial gainful activity by
 reason of any medically determinable physical or mental impairment which can be expected to result in death or
 has lasted or can be expected to last for a continuous period of not less than 12 months . . ."

II. Summary Of The Evidence

Plaintiff is a 57 year old male who is 6'2" tall and weighs 290 lbs. (Record at pp. 22-24.) Plaintiff completed two years of college. (*Id.* at pp. 22-23.) He resides in Eastern Washington with his wife. (*Id.*) From 1989 until May 12, 2006, Plaintiff was employed as an "auto service manager" for an automotive garage. (*Id.* at p. 91.)

An auto service manager is a management position with mostly administrative and some clerical job functions. (*See id.* at pp. 36, 40.) The job of auto service manager is "described as sedentary" and includes tasks such as coordinating staff and personnel, reviewing and submitting proposals to vendors, procurement, purchasing, and directing auto repair and maintenance. (*See id.*)

Although Plaintiff's job title was "auto service manager", the record shows that Plaintiff performed duties in addition to those typically performed by those with this title. Plaintiff predominantly acted as an auto service manager but at times *also* performed duties generally performed by, attributed to, and listed under the job description of a garage supervisor. (*See id.*) The duties of a garage supervisor are not sedentary. A garage supervisor is usually on his feet, on the garage floor, overseeing repairs and the daily functioning of the automotive garage.

Plaintiff alleges that he became disabled on May 12, 2006, when he terminated from this job (hereinafter, "the disabling event"). Plaintiff has not been employed since the alleged disabling event. (*Id.* at p. 24.) Plaintiff alleges that because he cannot stand on his feet and he cannot perform clerical work, he cannot perform his past job and he therefore is disabled and entitled to Social Security Disability and Social Security Disability Insurance Benefits.

A. Plaintiff's Testimony of Injury/Disability

In support of his Application for Disability and Disability Insurance

1 Benefits, Plaintiff testified to the following physical impairments at the Hearing:
2 retinal detachment³ in both eyes for which he underwent operations in 1999 and
3 2000, left shoulder impingement limiting movement in his left shoulder, arthritis
4 in his knees and diabetes. (Record at pp. 24, 25, 28, 29, 31, 41, 42.)

5 Plaintiff testified that because of these impairments, he cannot walk for
6 more than three blocks without resting. He also testified that after walks, his legs
7 “swell” and turn “red.” Plaintiff stated sitting is uncomfortable; he can only sit
8 for about thirty minutes before his legs ache and get stiff and he needs to stand and
9 stretch often. (*Id.* at pp. 29, 31, 41, 42.) According to Plaintiff, he can stand for
10 twenty minutes at a time for a total of about two hours a day, but he will “pay the
11 price” and will likely be “[im]mobile the next day.” (*Id.* at pp. 26, 29, 31.)

12 Plaintiff reported that he needs to “brace” himself to bend, he cannot “come
13 off the floor without assistance”, he must hold onto something to rise from a
14 seated position, he avoids climbing stairs, and he does not kneel. (*Id.* at pp. 26,
15 29-30, 32.) He further testified that although he can raise his arms over his head,
16 he cannot lift or carry items over 40 lbs. (*Id.* at p. 27.)

17 As a result of Plaintiff’s retinal detachments, he alleges he does not have
18 peripheral vision, does not jog, and does not drive at night. Moreover, Plaintiff
19 testified at the Hearing that the burning and discomfort in his eyes cause him to
20 rinse his eyes every 15-20 minutes when reading. (*Id.* pp. 25, 28, 31, 42.)

21 At the Hearing, Plaintiff described a typical day as waking up at around six
22 in the morning, watching television, reading a little, feeding and cleaning his pets,
23 and doing light housework such as the dishes and vacuuming. (*Id.* at pp. 27-28.)

24 B. The Medical Evidence

25 The ALJ received the following medical evidence supporting and refuting
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27 ³ Retinal detachment is an eye disorder in which the retina peels away from its underlying layer of support tissue.
28 Initial detachment may be localized, but without rapid treatment the entire retina may detach, leading to vision loss and blindness.

1 Plaintiff's claim of disability:

- 2 - *1999 & 2000* - Plaintiff underwent operation for rhegmatogenous retinal
3 detachments. (Record at pp. 162-167)
- 4 - *2002-2006* - Plaintiff was treated by a Doctor of Osteopathy for his vision.
5 (*Id.* at pp. 131-134.)
- 6 - *December 6, 2005* - Daniel Ostrander, M.D., Plaintiff's primary care
7 physician, noted that Plaintiff's detached retinas were "stable at present."
8 (*Id.* at p. 135.)
- 9 - *June 1, 2006* - Plaintiff visited Dr. Ostrander at which time he noted,
10 "Currently doing well . . . no complaints or problems." (*Id.* at p. 168.)
- 11 - *September 28, 2006* - Robert J. Rose, M.D., examined Plaintiff and found
12 that Plaintiff was obese and had stable bilateral detached retinas. Dr. Rose
13 observed that Plaintiff had a normal walking gait and used neither a cane
14 nor an assistive device. Dr. Rose concluded that Plaintiff could walk for
15 one mile without resting. (*Id.* at pp. 146-151.) An MRI of Plaintiff's knees
16 showed no significant arthritis. (*Id.* at p. 151.)
- 17 - *December 6, 2006* - Dr. Ostrander observed tenderness in Plaintiff's knees
18 and occasional discomfort at the maximum range of motion in his left
19 shoulder. (*Id.* at p. 168.)
- 20 - *January, 2007* - An orthopedic doctor, Douglas C. Norquist, examined
21 Plaintiff and concluded that Plaintiff had knee pain and impingement
22 syndrome. (*Id.* at pp. 180-181.) Dr. Norquist noted that Plaintiff should
23 "continue with the intermittent use of anti-inflammatory medication and
24 Aleve . . . and some good quad rehab The next suggestion would be to
25 inject both knees but I do not think he is to that stage yet." (*Id.* at p. 181.)
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- 1 - February, 2007 - Dr. Ostrander examined Plaintiff and noted: "This patient
2 has done well in the past year and has no major medical issues." Plaintiff's
3 knees, left shoulder and retinas were all stable. (*Id.* at pp. 168-171.)
4 - June 15, 2007 - After reviewing Plaintiff's medical history over the
5 preceding 15 years, Dr. Ostrander wrote a letter stating that Plaintiff had
6 "bilateral knee arthritis and visual incapacities following his detached
7 retinal surgeries" and the chronic illnesses of diabetes mellitus and
8 hypercholesterolemia. (*Id.* at p. 178.) Dr. Ostrander opined that Plaintiff
9 was/is capable of light work. (*Id.*)

10 C. Vocational Expert Testimony

11 An impartial vocational expert, Fred Cutler, testified at the Hearing
12 regarding Plaintiff's present ability to do his past job duties.

13 Mr. Cutler testified that although Plaintiff's previous job title was "auto
14 service manager", at times he acted as and performed the job duties of a garage
15 supervisor. In this regard, Plaintiff's job was a "composite" of the mostly
16 sedentary position of auto service manager and the mostly non-sedentary position
17 of garage supervisor. (Record at pp. 36, 40.)

18 When asked by the ALJ whether, given Plaintiff's mobility limitations,
19 what kind of work Plaintiff could perform, Mr. Cutler responded that Plaintiff
20 could perform sedentary work. (*Id.* at pp. 35-36.) The ALJ then asked whether
21 given Plaintiff's mobility limitations, he could perform *just his past auto service*
22 *manager position duties* as that job is typically seen and described in the national
23 economy (i.e., without garage supervisor job duties) to which Mr. Cutler
24 responded "Yes." (*Id.* at p. 36.) Mr. Cutler opined that Plaintiff *should* be able to
25 perform his past auto service manager duties as that position is generally described
26 and performed in the national economy because that position is sedentary.

27 Mr. Cutler did, however, testify that Plaintiff's alleged eye condition and
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1 his need to rinse his eyes every 15-20 minutes while reading could prevent him
2 doing sedentary work. Generally opining about what jobs in the national economy
3 Plaintiff could do as opposed to explicitly discussing Plaintiff's ability to do his
4 past auto service manager job duties, Mr. Cutler opined that "sedentary work is
5 going to be either clerical or its going to be you know some type of function [sic]
6 where sight, sustained sight is going to be required." (*Id.* at p. 37.) According to
7 Mr. Cutler, Plaintiff's eyesight would be a "major issue" because "typically
8 people working at sedentary jobs need only be able to concentrate and read. And
9 if you can only do that for 15 to 20 minutes" it could be a "major barrier to being
10 able to productively work." (*Id.* at pp. 36-37.) Mr. Cutler did identify certain
11 jobs such as cashiering, ticket selling, factory and agricultural work that are
12 sedentary and do not require a lot of reading. (*Id.* at pp. 37-38.)

13 **III. Summary Of The Administrative Law Judge's Decision**

14 The ALJ considered all the evidence, including Plaintiff's own testimony,
15 and concluded that the weight of the medical evidence did not support Plaintiff's
16 allegation of disability.⁴ The ALJ found that Plaintiff's "medically determinable
17 impairments could reasonably be expected to produce the alleged symptoms, but
18 [his] statements concerning the intensity, persistence and limiting effects of these
19 symptoms are not entirely credible." (Record at p. 15.) Critical to the ALJ's
20 findings was the fact that there was no evidence that Plaintiff ever complained to
21 his doctors of burning and discomfort in his eyes or of the need to rinse his eyes.
22 Also critical to the ALJ's finding was that the medical records show that Plaintiff
23 did not complain about pain in his knee or shoulder until six months *after* the
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25 ⁴ The ALJ considered the following evidence, pursuant to 10 CFR § 404.1529(c), in assessing the credibility of
26 Plaintiff's statements regarding the intensity of his injuries and symptoms: (1) Plaintiff's daily activities; (2) the
27 location, duration and frequency and intensity of Plaintiff's pain or symptoms; (3) factors that precipitate and
28 aggravate the symptoms; (4) the type, dosage, effectiveness and side effects of any medication that claimant takes
or has taken to alleviate pain or other symptoms; (5) treatment, other than medication, the claimant receives or has
received for relief of pain or other symptoms; (6) any measures other than treatment the claimant uses or has used
to relieve pain or other symptoms; and (7) any other factors concerning Plaintiff's functional limitations and
restrictions due to pain or other symptoms. (Record at p. 17.)

1 alleged disabling event, and even then the medical records show that these
2 conditions were “stable.” (*Id.* at p. 16.) Furthermore, the ALJ afforded
3 “significant weight” to Dr. Ostrander’s opinion that Plaintiff can perform “light
4 work” because he has been treating Plaintiff for fifteen years. (*Id.*)

5 Accordingly, because the ALJ found: (1) “the claimant has the residual
6 capacity to perform sedentary work except that claimant would need to avoid all
7 crouching, crawling, kneeling and vibration and could only occasionally climb
8 stairs, use foot pedals and reach overhead with the left upper extremity” and (2)
9 Plaintiff is capable of returning to his past relevant work an auto service manager
10 as generally performed, the ALJ denied Plaintiff’s Application. (*Id.* at pp. 13, 17.)
11 Plaintiff disputes both these findings on Appeal.

12 **PLAINTIFF’S CONTENTIONS**

13 Plaintiff argues the ALJ erred by finding that he Plaintiff can perform his
14 past sedentary auto service manager job. Specifically, Plaintiff contends the ALJ
15 erred by:

16 (1) making an adverse credibility finding against Plaintiff without
17 identifying which specific portions of Plaintiff’s testimony he found not credible
18 and the reasons why; and

19 (2) not accepting vocational expert Fred Cutler’s testimony that a person
20 who needs to rinse his eyes every 15-20 minutes is not a productive worker as
21 sufficient to shift the burden to Defendant to prove that there are other jobs in the
22 national economy that Plaintiff could perform accordingly.

23 **STANDARD OF REVIEW**

24 Pursuant to 42 U.S.C. § 405(g), this Court’s jurisdiction is limited to
25 reviewing the ALJ’s decision to determine if: (1) the ALJ’s findings are supported
26 by substantial evidence; and (2) are free from material legal error. 42 U.S.C. §
27 405(g) (“The findings of the Commissioner of Social Security as to any fact, if
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1 supported by substantial evidence, shall be conclusive . . .”); *see also Tommasetti*
 2 *v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008) (court will disturb the denial of
 3 benefits only if the decision contains legal error or is not supported by substantial
 4 evidence); *Batson v. Comm’r, Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir.
 5 2004); *Macri v. Chater*, 93 F.3d 540, 543 (9th Cir. 1996).

6 Substantial evidence is “such relevant evidence as a reasonable mind might
 7 accepts as adequate to support a conclusion.” *Tommasetti*, 533 F.3d at 1038
 8 (internal citations omitted). The “evidence must be more than a mere scintilla but
 9 not necessarily a preponderance.” *Id.*

10 Therefore, an ALJ’s findings should be upheld if they are supported by
 11 reasonably drawn inferences. *Id.* When the evidence can reasonably support
 12 either affirming or reversing the ALJ’s conclusion, the Court may not substitute its
 13 judgment for that of the ALJ. *See Sorenson v. Weinberger*, 514 F.2d 1112, 1119
 14 n10 (9th Cir. 1978).

15 DISCUSSION

16 This Court has jurisdiction of this Appeal pursuant to 42 U.S.C. § 405(g),
 17 which authorizes district court review of a final decision by the Commissioner of
 18 Social Security following a hearing in which the plaintiff was a party.

19 I. Establishing Disability Under The Social Security Act

20 A person is “disabled” for the purpose of receiving social security benefits
 21 if he is unable to “engage in any substantial gainful activity by reason of any
 22 medically determinable physical or mental impairment which can be expected to
 23 result in death or which has lasted or can be expected to last for a continuous
 24 period of not less than 12 months.” 42 U.S.C. § 416(i); 42 U.S.C. § 423(d)(1)(A).

25 The Social Security Administration has established a five step sequential
 26 evaluation for determining whether a person is disabled. 20 C.F.R. § 404.1520(a).
 27 The burden of proof is on the claimant as to the first four steps. If the fifth step is
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1 reached, the burden shifts to the Commissioner to prove that work the claimant
2 can do exists in significant numbers in the national economy. 20 C.F.R. §
3 404.1520(g); § 20 C.F.R. § 404.1560(c). If, at any of the steps, the claimant is
4 “not disabled,” the analysis ends and the claimant is not entitled to disability
5 insurance benefits. *See Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999).

6 First, it is determined whether the claimant is engaged in “substantial
7 gainful activity.” If so, benefits are denied. *See* 20 C.F.R. § 404.1520(b); 20
8 C.F.R. § 404.1572(a); 20 C.F.R. § 404.1572(b); 20 C.F.R. § 404.1574; 20 C.F.R. §
9 404.1575. Here, the ALJ found that Plaintiff has not engaged in substantial
10 gainful activity since the alleged onset of his disability. This finding is not in
11 dispute.

12 Second, it is determined whether the claimant has a medically severe
13 impairment or combination of impairments. If the claimant does not have a severe
14 impairment or combination of impairments, benefits are denied. *See* 20 C.F.R. §
15 404.1520(c); 20 C.F.R. § 404.1521; Social Security Rulings (SSRs) 85-28, 96-3p
16 and 96-4p. Here, the ALJ’s finding that Plaintiff’s obesity, bilateral knee arthritis,
17 bilateral detached retinas, and left shoulder impingements are severe impairments
18 is not in dispute.

19 Third, if the claimant has a severe impairment, it is determined whether the
20 impairment meets or equals one of a number of “listed impairments” in the federal
21 regulations. If the impairment meets or equals a “listed impairment,” the claimant
22 is conclusively presumed to be disabled. *See* 20 C.F.R. § 404.1520(d); 20 C.F.R.
23 § 404.1525; 20 C.F.R. § 404.1526. If the claimant’s impairments neither meet nor
24 equal the list of impairments, the analysis must continue to step four. Here, the
25 ALJ’s finding that Plaintiff’s impairments was not on the list of impairments is not
26 in dispute and was not dispositive.

27 Fourth, if the impairment does not meet or equal a “listed impairment,” the
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1 court then determines the claimant's residual functional capacity and whether the
2 claimant's impairment prevent him from performing his past relevant work. If the
3 claimant can perform his past relevant work, benefits are denied. 20 C.F.R. §
4 404.1520(e); 20 C.F.R. § 404.1520(f).

5 With respect to step four, the ALJ found that Plaintiff has the residual
6 functional capacity to perform his past relevant auto service manager function
7 because "[a]lthough [Plaintiff] is unable to perform sports or other strenuous
8 activities, his activities of daily living are conducive to at least sedentary work."
9 (Record at p. 15.) The parties dispute this finding.

10 Lastly, if the claimant cannot perform past relevant work, the burden shifts
11 to the Commissioner to show that the claimant is able to perform other kinds of
12 work and the prevalence of those jobs in the national economy. The claimant is
13 entitled to benefits only if he is unable to perform this "other work." 20 C.F.R. §
14 404.1520(g); 20 C.F.R. § 416.920; *see Bowen v. Yuckert*, 482 U.S. 137, 140-42
15 (1987). Here, because the ALJ found that Plaintiff has the residual functional
16 capacity to perform his past relevant work, the ALJ did not consider the fifth step.
17 The parties dispute whether the ALJ should have considered the prevalence of
18 jobs Plaintiff can perform in the national economy.

19
20 A. The ALJ Provided Clear And Convincing Reasons For
Discrediting Plaintiff's Testimony Of Injury And Pain

21 The ALJ evaluates a claimant's symptom testimony under a two-step
22 analysis. First, the claimant must "produce medical evidence of an underlying
23 impairment which is reasonably likely to be the cause of the alleged pain."
24 *Bunnell v. Sullivan*, 947 F.2d 341, 343 (9th Cir. 1991).

25 Once the claimant produces this evidence, the medical findings need not
26 support the severity of the symptoms, and the ALJ must provide clear and
27 convincing reasons and make specific findings to support a conclusion that a
28 plaintiff is not credible. *See Parra v. Astrue*, 481 F.3d 742, 750 (9th Cir. 2007)

1 (“the ALJ must provide clear and convincing reasons to reject a claimant’s
2 subjective testimony by specifically identifying what testimony is not credible and
3 what evidence undermines the claimant’s complaints.”) Thus where the ALJ has
4 articulated his reasons for doing so, this Court should not disturb an ALJ’s adverse
5 credibility finding. *See id.* (“generally, questions of credibility and resolution of
6 conflicts in the testimony are the functions solely for the” ALJ.).

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8 Several types of evidence may undermine the complainant’s claims of
9 disability. The claimant’s lack of self-reporting to his physicians about the extent
10 of his alleged symptoms is a clear and convincing reason to find the claimant not
11 to be credible. *Connett v. Barnhart*, 340 F.3d 871, 873 (9th Cir. 2003)
12 (Commissioner properly rejected plaintiff’s testimony in part because she never
13 reported the alleged restriction to a physician). Similarly, testimony about the
14 claimant’s activities may provide a basis for finding him not to be credible. The
15 Ninth Circuit reasoned that “if, despite his claims of pain, a claimant is able to
16 perform household chores and other activities that involve many of the same
17 physical tasks as a particular type of job”, the ALJ may conclude that the
18 claimant’s pain does not prevent him from working.” *Fair v. Bowen*, 885 F.2d
19 597, 603 (9th Cir. 1989). Furthermore, “contradiction with the medical record is a
20 sufficient basis for rejecting the claimant’s subjective testimony.” *Carmickle v.*
21 *Cmm’r of Soc. Sec. Admin.*, 533 F.3d 1155, 1161 (9th Cir. 2008).

22 Here, the ALJ rejected Plaintiff’s testimony regarding the intensity,
23 persistence and limiting effects of his symptoms as “not entirely credible.”
24 (Record at p. 15.) In support of his adverse credibility finding, the ALJ pointed to
25 medical evidence that contradicted Plaintiff’s claims of injury, Plaintiff’s own
26 testimony regarding his daily activities, and the absence of evidence in the record
27 of Plaintiff’s complaints to his doctors about his eyes.⁵

28 ⁵ Specifically, the ALJ found Plaintiff not to be credible for the following reasons: (1) Plaintiff had comprehensive
physicals with Dr. Ostrander six months before and three weeks after the alleged disabling event and “expressed no

1 The Court finds that the in light of the medical evidence, the ALJ was
 2 entitled to reject Plaintiff's testimony and specifically and convincingly justified
 3 his reasons for doing so. *See Parra*, 481 F.3d at 750. Accordingly, the ALJ's
 4 adverse credibility finding of Plaintiff's testimony is supported by substantial
 5 evidence and the ALJ did not commit reversible error.

6 B. The ALJ Could Not Consider Other Jobs In The National
 7 Economy Because Plaintiff Did Not Meet His Burden of
 8 Proving An Inability To Perform His Past Relevant Work

9 Unless a claimant proves that he cannot perform his past relevant work, he
 10 is not disabled and the ALJ shall not consider other jobs the claimant can perform.
 11 Here, the ALJ declined to proceed to step five because he found that Plaintiff can
 12 perform his past relevant work as an auto service manager, as that job is typically
 13 described and performed in the national economy.

14 To determine whether a claimant has the residual capacity to perform his
 15 past relevant work, the ALJ must ascertain the demands of the claimant's former
 16 work and then compare those demands to his present capacity. 20 C.F.R. §
 17 404.1520(e). With respect to the former work, the claimant must prove he is
 18 unable to return to his former *type* of work – not just his *actual* former job. *See*
 19 *Villa v. Heckler*, 797 F.2d 794, 798 (9th Cir. 1986); *see also Pinto v. Massanari*,
 20 249 F.3d 840, 844 (9th Cir. 2001); SSR 82-61 (ALJ may find claimant is capable
 21 of performing work either as it is generally performed in the national economy or

22 specific complaints or problems and reported he was" doing well" (Record at p. 15.); (2) in December, 2006,
 23 almost six months after the disabling event, Plaintiff "presented to Dr. Ostrander with pain complaints in the left
 24 shoulder and bilateral knee pain", but Dr. Ostrander's examination noted that Plaintiff had tenderness in his joint
 25 lines and a full range of motion in his shoulders (*Id.*); (3) nine months after the allegedly disabling event, Plaintiff
 26 was again examined by Dr. Ostrander who reported that Plaintiff's shoulder, knees and retinas were stable (*Id.* at p.
 27 16); (4) in January, 2007, Plaintiff was examined by Dr. Norquist and informed Dr. Norquist that "his shoulder
 28 pain was gone" (*Id.*); (5) there was no evidence in the medical record to substantiate Plaintiff's statement that his
 retina condition limits him to lifting 40lbs of weight (*Id.*); (6) there is no evidence in the medical record to support
 Plaintiff's alleged limitations relative to sitting, standing or walking or severe fatigue requiring rest (*Id.*); (7)
 Plaintiff's testimony that he watches television, reads, does household chores such as vacuuming, dishwashing, and
 mowing the lawn, and can walk three blocks without resting undermines his claims of excess pain and immobility
 (*Id.* at pp. 14-16); and, lastly, (8) there "is no evidence in the record to support [Plaintiff's] need to rinse his eyes
 every 15 minutes." (*Id.* at p. 16.)

1 as plaintiff performed it).

2 The ALJ's finding that Plaintiff has the residual functional capacity to be an
3 auto service manager as that job is generally performed was supported by the law.
4 *See id.* Here, Plaintiff argued that because he cannot perform the garage
5 supervisor work that he used to do, he does not have the residual functional
6 capacity to do his past relevant work. The ALJ disagreed, finding that the point of
7 comparison for determining Plaintiff's past relevant work is not what actually
8 Plaintiff *did* but how Plaintiff's job is generally described in the national
9 economy. Thus, the fact that Plaintiff sometimes performed garage supervisor
10 duties when he was technically employed as an auto service manager and his
11 present physical limitations prevent him doing those garage supervisor functions,
12 does not mean he cannot work solely as an auto service manager. The fact that
13 Plaintiff did perform garage supervisor duties from time to time is irrelevant for
14 determining whether he can work in the future as an auto service manager for
15 another employer. (*See* Record at pp. 15-17.)

16 Moreover, the ALJ's finding was also supported by substantial evidence.
17 The Ninth Circuit and 20 C.F.R. § 404.1566(e) and 20 C.F.R. § 416.966(e)
18 empower the ALJ to use vocational experts as sources of occupational evidence of
19 a complainant's residual functional capacity. *See Pinto*, 249 F.3d at 844; *see also*
20 *Valentine v. Cmm'r Soc. Sec.*, 08-3574 (9th Cir. July 24, 2009) (ALJ properly
21 relied on the vocational expert's responses to the hypothetical which reflected the
22 complainant's residual capacity). Here, the ALJ relied on both the testimony of
23 the impartial vocational expert Fred Cutler that a person with Plaintiff's
24 impairments could perform sedentary jobs and the medical record to conclude that
25 Plaintiff has the residual functional capacity to do his past sedentary work of an
26 auto service manager. (Record at p. 17.)

27 A hypothetical propounded to a vocational expert must be based on medical
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1 assumptions that are supported by substantial evidence in the record. *Osenbrock*
2 *v. Apfel*, 240 F.3d 1157, 1165 (9th Cir. 2001). Here, the ALJ presented Mr. Cutler
3 with a hypothetical containing assumptions supported by the medical record⁶ and
4 asked him if the garage supervisor functions were “separated out” from Plaintiff’s
5 old job, would Plaintiff be have capacity to the do his old job. Mr. Cutler
6 responded that Plaintiff could; despite his mobility limitations, Plaintiff could do
7 the sedentary, managerial work of an auto service manager as that job is typically
8 performed. (Record at pp. 36, 40.) Therefore, substantial evidence supported the
9 ALJ’s finding that Plaintiff has the residual functional capacity to do his past
10 relevant work.

11 Having determined at step four that Plaintiff’s impairments do not prevent
12 him from performing auto service manager functions, the ALJ could not, as a
13 matter of law, engage in the step five analysis. Accordingly, Plaintiff’s contention
14 that the ALJ failed to consider at step five evidence of the availability of sedentary
15 jobs Plaintiff can perform that would not aggravate his eye condition is not
16 reversible error.

17 CONCLUSION

18 The Court concludes that the ALJ’s decision is supported by substantial
19 evidence and is free from material legal error. Accordingly, the Court **GRANTS**

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26 ⁶ The ALJ’s hypothetical contained assumptions regarding only Plaintiff’s mobility impairments. The ALJ’s
27 hypothetical did not have to ask Mr. Cutler to consider whether a person with Plaintiff’s mobility impairments *and*
28 need to rinse his eyes every fifteen to twenty minutes when reading could perform sedentary work because the ALJ
found Plaintiff’s testimony about the burning and irritation in his eyes to be not credible and lacking in evidentiary
support.

1 Defendant's Motion for Summary Judgment, **DENIES** Plaintiff's Motion for
2 Summary Judgment and hereby **ORDERS** that judgment be entered in favor of
3 Defendant.

4 IT IS SO ORDERED.

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6 DATED: August 11, 2009

7 By 

8 CONSUELO B. MARSHALL
9 UNITED STATES DISTRICT JUDGE
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